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SUPREME COURT, U.S.

No. 07-533

In the

Supreme Court of the United States

EUGENE MONGEAU,

Petitioner,

v.

CITY OF MARLBOROUGH and STEPHEN REID, individually and as Commissioner of Inspectional Services and as a Member of the City of Marlborough Site Plan Review Committee,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITIONER'S REPLY BRIEF

ROSANNA SATTLER
CATHERINE J. SAVOIE
Of Counsel
Posternak, Blankstein & Lund, LLP
800 Boylston Street
Boston, MA 02199-8004
Telephone: (617) 973-6100
Facsimile: (617) 722-4951

J. DAVID BREEMER
**Counsel of Record*
STEVEN GEOFFREY GIESELER
Of Counsel
Pacific Legal Foundation
3900 Lennane Drive
Suite 200
Sacramento, CA 95834
Telephone: (916) 419-7111
Facsimile: (916) 419-7747

Counsel for Petitioner

QUESTION PRESENTED

When it is alleged that a local official denied a land use permit without any health, safety, or welfare justification, is the standard for determining whether the decision violates substantive due process a "shocks the conscience" test, as the First and Third Circuits hold, or a rational basis analysis, as applied in the Second, Fourth, Fifth, Sixth, Seventh, and Ninth Circuits?

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INTRODUCTION

In adopting a rigorous "shock the conscience," rather than a rational basis, test for identifying a substantive due process violation in the land-use context, the decision of the First Circuit Court of Appeals warrants review under three of the criteria listed in Supreme Court Rule 10. *See* Petition at 10-21 (describing conflicts between decision below and other federal appellate courts and this Court); *see also* Brief of Amicus Curiae of New England Legal Foundation and National Association of Industrial and Office Properties, Massachusetts Chapter, at 4-9 (describing conflict between decision below and decisions of state high courts).

Moreover, this case is a proper vehicle for addressing the scope of substantive due process in the land-use arena because the issue is squarely and concretely presented. Given the undeniable reality that federal circuit courts are either at odds with each other on whether the rational basis or shocks the conscience test controls property-based due process claims, or internally confused and inconsistent on the issue, the Court should grant this Petition to bring uniformity on the issue.

ARGUMENT

I

THE DECISION BELOW SQUARELY PRESENTS THE ISSUE OF THE WHETHER A "SHOCKS THE CONSCIENCE" TEST DETERMINES WHEN A CLAIM FOR A VIOLATION OF SUBSTANTIVE DUE PROCESS HAS BEEN STATED IN THE LAND USE CONTEXT

A. The Issue Was Raised Below, and Passed on in a Published Opinion

In their Opposition, Respondents make several remarks suggesting that the issue presented is not properly before this Court because Petitioner Eugene Mongeau (Mongeau) did not argue the issue at the district court level. It is far too late for this defense. This Court will review issues raised or "passed on" in the court below. *United States v. Williams*, 504 U.S. 36, 42 (1992) (noting that the Court "will not review a question not pressed or passed on by the courts below" and this means the Court will review an issue ruled on by an appellate court even if not pressed).

In proceedings before the First Circuit Court of Appeals, Mongeau expressly argued that a rational basis/traditional arbitrariness test determines whether a property owner can state a claim for a substantive due process violation arising from a land-use denial. The First Circuit expressly passed on that issue, holding that a "shocks the conscience" inquiry and not a rational basis approach controls land use due process claims within its jurisdiction. *See* Petition Appendix

(App.) at A-2. Accordingly, the issue of the correct substantive due process standard is properly presented.

B. This Case Is Ripe

In two short sentences at the outset of their Opposition, Respondents also make a vague assertion that this case is not ripe. Opposition at 2-3. Since Respondents do not elaborate on this claim in the remainder of their 27-page Opposition, or offer it as a question presented, the Court need not consider it. *Andrews v. Louisville & N. R. Co.*, 406 U.S. 320,324-25 (1972) (Court will not consider issues not properly raised at petition stage).

In any event, Respondents failed to mention ripeness in the district court and barely mentioned it below and here, and no court has ever passed on the issue, precisely because there is no serious dispute on that ground. Mongeau spent approximately three years submitting and pursuing land use applications, appeals, and variances. App. at A-2-4. Two separate permit applications were denied before he appealed to the City's Zoning Board of Appeals for a variance. He succeeded in securing a variance and then sought and received several extensions of time, during which period he sought and obtained permission from a local site-plan committee and the Massachusetts Department of Environmental Protection. It was only when the City's Building Inspector *still* refused to issue a permit, *despite the variance* granted by the Board and the approval of all relevant bodies, and without any rational basis, that Mongeau sought judicial relief.

Respondents imply that Mongeau should have sought relief from the Zoning Board. Opposition at 3.

However, they do not deny that Mongeau *did* go to the Board for such relief when it became apparent the variance would be delayed, but he was *denied* an additional extension of time. App. at A-4. At that point, Mongeau had been to that body on at least four occasions, the last time being informed the avenue was closed. In this context, it is specious for Respondents to assert, however casually, that Mongeau was required to respond to the Building Inspector's final irrational permit denial by appealing (again) to the Board for variance relief it had already granted and for which it had set a firm ending time. His claim is easily ripe. *See Eide v. Sarasota County*, 908 F.2d 716, 724, n.13, 726 (11th Cir. 1990) (substantive due process claim held ripe as soon as allegedly arbitrary land use decision is made and no further applications needed).

II

RECENT DECISIONS DEMONSTRATE A CLEAR CONFLICT BETWEEN THE DECISION BELOW AND THE DECISIONS OF OTHER FEDERAL COURTS ON THE STANDARD FOR GAUGING WHETHER A REAL PROPERTY DEPRIVATION VIOLATES SUBSTANTIVE DUE PROCESS

Respondents attempt to deny the existence of federal conflicts on the appropriate method for finding a substantive due process violation in land use cases by asserting that decisions since *County of Sacramento v. Lewis*, 523 U.S. 833 (1998), uniformly adopt a "shocks the conscience" approach. This position can be easily disproven by this Court's own review of the precedent cited in the Petition, *see* Petition at 10-18, and

Mongeau will not repeat those points here. However, it may be useful to highlight several of the most obvious conflicts overlooked by Respondents.

A. The Decision Conflicts with the Current Law of the Ninth Circuit

Respondents claim that there is no present conflict between the decision of the First Circuit and the decisions of the Ninth Circuit on the test for determining a substantive due process violation in the land-use context. Yet, a Ninth Circuit decision published on November 1, 2007, refutes this contention.

In *Crown Point Development, Inc. v. City of Sun Valley*,___F.3d___, 2007 WL 3197049 (9th Cir. 2007), the Ninth Circuit considered whether a substantive due process claim based on an allegedly irrational land-use action was viable in the Ninth Circuit after this Court's decision in *Lingle*. *Id.* at *2-3. The *Crown Point* Court held that the plaintiff property owner could proceed on its substantive due process claim against a permit denial because "the United States Supreme Court ruled in *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 532 (2005), that a property owner's challenge to a regulation that does not substantially advance legitimate interests is grounded in due process, not the Takings Clause." 2007 WL 3197049 at *1. In so doing, the court described the test for whether a substantive due process violation occurs as whether the land use action lacks "any substantial relation to the public health, safety, or general welfare." *See id.* at * 3, 4.

Thus, substantive due process claims arising from land-use regulation are independently viable causes of

action in the Ninth Circuit, as in the First, but they are reviewed under markedly different tests. In the First Circuit, a land-use plaintiff must show that the action "shocks the conscience." In the Ninth Circuit, the plaintiff must show that the action had no reasonable relation to a legitimate governmental interest. These differing standards account for very different historical results; while the First Circuit has found only one land-use complaint that stated a claim for a substantive due process violation (and that was 25 years ago), *see Roy v. City of Augusta, Maine*, 712 F.2d 1517, 1524 (1st Cir. 1983), the Ninth Circuit has found a properly stated claim on a number of occasions in the same context under that circuit's rational basis approach. *See, e.g., City of Del Monte Dunes at Monterey, Ltd. v. City of Monterey*, 920 F.2d 1496, 1508 (9th Cir. 1990); *Lockary v. Kayfetz*, 917 F.2d 1150, 1155-56 (9th Cir. 1990).

B. The Decision Below Conflicts with the Current Law of the Fifth Circuit

The foregoing analysis also aptly summarizes the positions of the First Circuit and the Fifth Circuit. Indeed, in answer to the Petition's reference to several post-*Lewis* Fifth Circuit decisions that clearly apply a rational basis test to a land use permit claim—in conflict with the First Circuit's "shocks the conscience" approach—Respondents can muster only a citation to the non-land use permitting case of *Conroe Creosoting Co. v. Montgomery County*, 249 F.3d 337, 341 (5th Cir. 2001).

Conroe is, however, woefully inadequate to dispel the conflict pointed out in the Petition. First, *Conroe* is not pertinent to land use denials. It is also an aberration to the current law of the circuit. Since the

2001 *Conroe* decision, the Fifth Circuit has confirmed on several occasions that the test is whether a permit denial is "rationally related to a legitimate governmental interest," not whether it "shocks the conscience." *Mikeska v. City of Galveston*, 451 F.3d 376, 379 (5th Cir. 2006); *Simi Inv. Co., Inc. v. Harris County, Tex.*, 256 F.3d 323 (5th Cir. 2001) (substantive due process guarantees guard against "illegitimate and arbitrary" land use actions). This analysis builds on other post-*Lewis* decisions. *See, e.g., Hidden Oaks Ltd. v. City of Austin*, 138 F.3d 1036, 1044 (5th Cir. 1998) ([A] permit denial "comports with substantive due process if the action is rationally related to a legitimate government interest."). At best, *Conroe* is an anomaly that has been limited to its facts.

In the Fifth Circuit then, a rational basis test governs whether a land use denial violates substantive due process. And, as in the Ninth Circuit, viable claims have been stated under this approach in the Fifth Circuit. *See Mikeska*, 451 F.3d at 380; *Simi Inv. Co. v. Harris County*, 236 F.3d 240, 251 (2000). This contrasts, of course, with the First Circuit's general refusal to allow any substantive due process land-use claim to go forward under the "shocks the conscience" analysis. Therefore, the conflict between the Fifth and Ninth Circuits and the First Circuit on the appropriate test for a land-use substantive due process claim is real, current, and consequential. This warrants the Court's review of this case.

III

BUCKEYE NEVER SANCTIONED A "SHOCKS THE CONSCIENCE TEST;" IT APPLIED A RATIONAL BASIS TEST, AND DID NOT OTHERWISE REPUDIATE THIS COURT'S PRECEDENT FAVORING THAT TEST IN THE LAND USE CONTEXT

In opposition to Mongeau's claim that the decision of the First Circuit conflicts with this Court's own land use due process precedent, Respondents make much of the decision in *City of Cuyahoga Falls v. Buckeye Community Hope Foundation*, 538 U.S. 188 (2003). *See* Opposition at 2, 8-9. They seem to suggest that *Buckeye* conclusively resolved the issue of the proper due process test by applying a "shocks the conscience" approach. A close reading shows that this is not so.

In *Buckeye*, the Court determined that a government official's delay in issuing building permits did not violate substantive due process guarantees. As an initial part of its analysis, the Court cited to *Lewis* for the proposition that the official's refusal to issue the permits "in no sense constituted egregious or arbitrary government conduct." *Id.* at 198. But in doing so, the Court refrained from using the phrase "shocks the conscience" to describe the relevant test. Nor did the Court repudiate any of its many prior due process cases articulating a "reasonable relationship to a legitimate state interest" inquiry in land use disputes. Most tellingly, when the *Buckeye* Court actually analyzed the challenged conduct, it did so under the rational basis test. *See id.* at 199 ("[T]he law director's instruction to the engineer to not issue the permits

represented an eminently *rational* directive.") (emphasis added).

Consequently, *Buckeye* can be read to *confirm* that the rational basis analysis, rather than "shocks the conscience" test applied by the First Circuit, continues to control land use due process disputes. If not, *Buckeye* simply illustrates that the issue is outstanding and requires review. In the meantime, this Court's existing rational basis land use precedent continues to provide the default rule. This precedent does not support the lower court's application of a "shocks the conscience" test derived from police abuse cases. Nor is such an approach compelled by *Buckeye*. The lower court's departure from this Court's most pertinent land use precedent has resulted in a conflict with other circuits, and state courts, and for these reasons, the Petition should be granted.

CONCLUSION

For the foregoing reasons, the Petition should be granted.

DATED: November, 2007.

Respectfully submitted,

ROSANNA SATTLER
CATHERINE J. SAVOIE
Of Counsel
Posternak, Blankstein & Lund, LLP
800 Boylston Street
Boston, MA 02199-8004
Telephone: (617) 973-6100
Facsimile: (617) 722-4951

J. DAVID BREEMER
**Counsel of Record*
STEVEN GEOFFREY GIESELER
Of Counsel
Pacific Legal Foundation
3900 Lennane Drive, Suite 200
Sacramento, CA 95834
Telephone: (916) 419-7111
Facsimile: (916) 419-7747

Counsel for Petitioner